

BRB No. 91-1750

GENERAL FAIL)	
)	
Claimant)	
)	
v.)	
)	
ALABAMA DRY DOCK AND)	
SHIPBUILDING CORPORATION)	
)	
Self-Insured)	
Employer-Petitioner)	DATE ISSUED:
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Carrier-Respondent)	DECISION and ORDER

Appeal of the Order Dismissing Travelers Insurance Company of Richard D. Mills,
Administrative Law Judge, United States Department of Labor.

Walter R. Meigs, Mobile, Alabama, for employer.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative
Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Order Dismissing Travelers Insurance Company (89-LHC-2252) of
Administrative Law Judge Richard D. Mills, rendered on a claim filed pursuant to the provisions of
the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq* (the
Act). We must affirm the findings of fact and conclusions of law of the administrative law judge
which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v.*
Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor
Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant worked for employer as an outside boilermaker-rigger from 1952 until September

8, 1988, during which time he was exposed to loud noise. On May 14, 1987, claimant filed a claim under the Act for a 4 percent binaural hearing loss based on the results of an April 10, 1987 audiogram. Thereafter, claimant underwent a second audiometric evaluation on December 13, 1989, which revealed a 3.4 percent binaural hearing loss. A hearing was conducted on January 15, 1991, which was limited to the issue of whether Travelers Insurance Company (Travelers), which provided insurance coverage to employer from May 24, 1988 to May 24, 1989, was liable as the responsible carrier.

In his June 20, 1991 Order, the administrative law judge determined that employer was liable for claimant's benefits in its self-insured capacity, thereby rejecting employer's argument that pursuant to Section 8(c)(13)(D) of the Act, 33 U.S.C. §908(c)(13)(D)(1988), claimant could not be charged with awareness of his occupational hearing loss until sometime in 1990 when he personally received a copy of the April 10, 1987, audiogram and accompanying report.¹ Analyzing the responsible carrier issue under the standard set forth in *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), the administrative law judge found that claimant received constructive notice of the April 10, 1987, audiogram through his attorney, who made note of it in the May 14, 1987, claim. Inasmuch as both the filing audiogram and the May 14, 1987, claim predated May 24, 1988, when Travelers assumed the risk, the administrative law judge concluded that employer was liable for claimant's occupational hearing loss benefits in its self-insured capacity. Although employer also argued that Travelers was liable for the hearing loss claims under Alabama state law pursuant to the terms of its insurance policy with employer,² and should be estopped from denying responsibility

¹ Claimant was provided with a copy of the audiogram on December 14, 1990. The accompanying report was prepared on December 14, 1990.

² The applicable insurance contract between Travelers and employer provides, in pertinent part:

A. How This Insurance Applies

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the policy period.
2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

Employer's Exhibit 1 at 10.

based on its prior acceptance without reservation of the claims on February 1, 1989, the administrative law judge did not address these arguments as he found that he lacked jurisdiction to rule on the contractual rights of the parties.

On July 16, 1991, the parties submitted a proposed settlement agreement to the administrative law judge in which employer agreed to pay claimant a lump sum of \$2,250 plus \$2,000 for his attorney's fee and future medical benefits, affixing copies of both the April 10, 1987, and December 13, 1989, audiograms as supporting documentation. The proposed settlement was approved by the administrative law judge in a Decision and Order dated July 23, 1991.

Employer appeals the administrative law judge's finding that it is liable for the claim in its capacity as a self-insurer, reiterating the arguments it made below. In the alternative, employer asks that the Board certify the insurance questions presented in this case to the Alabama Supreme Court. Travelers responds, urging affirmance of the administrative law judge's order and denial of employer's request for certification.

Employer's arguments that the determination of the responsible employer is contingent upon claimant's receipt of the audiogram and accompanying report, that Travelers is liable pursuant to the terms of its insurance policy with employer, and that Travelers waived its right to contest liability by virtue of its February 1, 1989, letter to employer have previously been considered by the Board and are rejected for the reasons stated in *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993).³ The *Larson* standard, which the administrative law judge employed in analyzing the responsible carrier issue, was subsequently overruled in *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992). In *Good*, the Board adopted the decision of the United States Court of Appeals for the Ninth Circuit in *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1992), that receipt of the audiogram and accompanying report has no significance outside the procedural requirements of Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, and that the responsible employer or carrier is the one on the risk at the most recent exposure related to the disability evidenced on the audiogram determinative of the disability for which claimant is being compensated. See *Good*, 26 BRBS at 163. See also *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955). We note, however, that in the instant case the administrative law judge made no finding as to which of the two audiograms of record was determinative of claimant's disability. Additionally, the settlement agreement is silent as to which audiogram is determinative; rather, the parties attached copies of both audiograms to their proposed settlement in support of the settlement.⁴ Thus, since the party liable for claimant's hearing loss benefits is the one on the risk at the time of claimant's most recent exposure to injurious stimuli prior to the determinative audiogram, and the administrative law judge failed to make a finding as to which audiogram is determinative, we vacate the administrative law judge's order dismissing Travelers and we remand the case to the administrative law judge to make such a finding and determine the liable party consistent with *Good* and *Port of Portland*.

³ Employer's Motion for Certification of the insurance questions to the Alabama Supreme Court is denied, as there is no authority under the Act for the Board to take such action.

⁴ If the administrative law judge bases his findings on an average of the audiometric results, then the carrier at the time of the last audiogram relied upon could be held liable.

Accordingly, the administrative law judge's Order Dismissing Travelers Insurance Company is vacated and the case is remanded to the administrative law judge to make further findings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge